Supreme Court, U. S.
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No. 79-1003

IN THE

Supreme Court of the United States

October Term, 1979

COUNTY OF IMPERIAL, CALIFORNIA and the SUPERIOR COURT OF CALIFORNIA, in and for the COUNTY OF IMPERIAL,

Petitioners,

vs.

GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ JUAN DE LEON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY TO BRIEF FOR RESPONDENTS AND TO AMICUS CURIAE BRIEF.

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REPLY TO BRIEF FOR RESPONDENTS AND TO AMICUS CURIAE BRIEF.

The County of Imperial, California, ("County") and Superior Court of California, in and for the County of Imperial ("Superior Court") respond to the Brief for Respondents and Amicus Curiae Brief, as follows:

I.

THE CALIFORNIA SUPREME COURT ADJUDICATED ENFORCEABILITY OF THE EXPORT RESTRICTION IN McDOUGAL'S USE PERMIT AND THEREBY BARRED RESPONDENTS' ACTION.

A. Notwithstanding Avoidance of Any Constitutional Issue, the McDougal Decision Is Clearly a Final Judgment on the Merits so as to Bar Respondents' Action Under Either the Doctrine of Res Judicata or Collateral Estoppel.

In arguing *County of Imperial v. McDougal,* 19 Cal.3d 505 (1977) is not res judicata as to their action, Respondents and Amicus Curiae ("McDougal") emphasize the State Supreme Court did not determine the constitutionality of the subject use permit export restriction. (RB 20, 39, 44-47; AC 7.)[1] They further stress McDougal's right to continue to use tank trucks in his water sales operations. (RB 21, 31; AC 5, 6.) These factors, however, do not make *McDougal* a "non-decision" as to the merits of Respondents' action, as contended. (RB 21.)

The California Supreme Court, in partially affirming the judgment of the Superior Court, concluded said trial court's judgment ". . . enjoining [McDougal] from 'conducting a trucking operation on the premises similar to that which occurred commencing on June 30, 1972' appears to relate both to the sale of water for export outside the county and to the use of substantial numbers of trucks to carry the water from the property. *We conclude that the judgment must be upheld in the first aspect* but that there was insufficient

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[1]The Brief for Respondents, Amicus Curiae Brief and Brief for the Petitioners are referenced as "RB," "AC" and "PB," respectively. Abbreviated references used in the latter brief also appear herein.

evidence to justify the prohibition against the manner in which the business was operated." (C 4 emphasis added.)

Based on facts which established McDougal's predecessor agreed to imposition of the export restriction, and benefitted from the use permit as issued, the State Supreme Court held ". . . McDougal is estopped to assert that the prohibition in the Simpson permit against the sale of water for use outside the County is invalid, *and he is bound by the limitation*." (C 6 emphasis added.)

The State Supreme Court concluded it was unnecessary, under the facts of the case, to determine whether imposition of such an export restriction was constitutional. Specifically, the Court stated "[i]n view of this [estoppel] conclusion, we need not decide whether the prohibition against the export of water was valid." (C 6 Ftn. 3.)[2]

As shown, estoppel *is* an adequate and independent ground for a state court decision. (See *Enterprise Irrigation v. Farmers Mutual Land Co.*, 243 U.S. 157 (1916) and other authorities cited at PB 17-18.) In fact, constitutional questions are typically not determined by the courts, unless such a determination is absolutely necessary (16 C.J.S. Constitutional Law §94.) McDougal's appeal to this Court, wherein he attempted to renew his challenge to the use permit export restriction on constitutional grounds, was dismissed for want of a substantial federal question. (439 U.S. 944.)

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[2]The Court further indicated *Shelley v. Kramer*, 334 U.S. 1 (1947) relied on by McDougal is "inapposite" because said case "did not involve the waiver of rights or the challenge to the validity of a condition to the economic value of a permit whose benefits the permitee sought and accepted. Nor can Simpson's right to export water from the county be analogized to the constitutional right which the petitioners in *Shelley* sought to vindicate." (*Id.*).

Clearly, the State Supreme Court finally adjudicated the enforceability of the subject export restriction as against McDougal. Despite arguments to the contrary, it is apparent Respondents' action is merely a collateral attack on the *McDougal* decision.

As shown, any right to sell water from lands in the County depended on proper zoning entitlement. McDougal's predecessor acquired a use permit for the subject parcel and agreed to imposition of the subject export restriction. By purchasing the parcel, McDougal succeeded to rights under the permit but he also took subject to the limitation. (C 18.)

Respondents might have sought to acquire a right to export water by purchasing land and applying for a use permit to authorize such export. Or, they can purchase water from a land owner who already possesses proper entitlement.[3] Their action does not seek to vindicate any such rights. Instead, it seeks (and for the moment has achieved) an injunction against enforcement of the export restriction in McDougal's use permit. (1a-25a; B 12.)

Respondent Gallego Munoz has been McDougal's broker for water sales in Mexico and he participated in the state court proceedings with McDougal as *amicus curiae* before the State Supreme Court. (67a-78a.) Messrs. Martinez and De Leon are likewise contractors of McDougal and/or of Gallego Munoz. (7a.) Said Respondents are not "strangers" and they have established no independent standing separate from McDougal.[4]

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[3]The record establishes Respondents *are* authorized to acquire and export water from the "Clifford Well" located in the County, but they instead seek to purchase cheaper water from McDougal, whose well is located 8 miles nearer the international border. (34a, 40a).

[4]The County wishes to incorporate by reference its arguments and authorities appearing at PB 18-23.

Respondents claim the County's arguments are "circular." (RB 30-31.) However, any "circle" has resulted from their being permitted to relitigate the enforceability of the restriction in McDougal's permit. Respondents' action is barred under either the doctrine of res judicata or collateral estoppel.

B. The District Court Has Enjoined Enforcement of the Very Export Restriction Upheld by the State Supreme Court and It Therefore Violates 28 U.S.C. §2283.

The district court's injunction is said by Respondents to not violate the Anti-Injunction Act ("Act") because ". . . it runs *only* to County officials and not to California courts." (RB 33.) Respondents and McDougal further claim there is an absence of conflict between the federal injunction and the decision of the California Supreme Court.[5] They argue entitlement as third parties to mount a challenge in the federal court against the County's asserted "home embargo." (RB 35-39; AC 7-8.)

Said arguments are obviated by analysis of applicable facts and law.

Respondents' action sought to enjoin the County, certain of its officers *and the Superior Court* from enforcing the export restriction in McDougal's use permit. (1a-25a.) As actually issued, the district court's preliminary injunction enjoined the county and its officers. (B 12.) It is clear, however, a restraint against the parties rather than against

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[5]Respondents assert "[o]ur dual judicial system *is* operating without the presence of the conflicting orders between federal and state courts which 28 USC 2283 is designed to prevent. The California courts have recognized this by staying their proceedings pending decision on the federal questions." (RB 34-35.) And, McDougal likewise claims "[t]he trial court specifically stayed all contempt proceedings pending the decision of this court in the case at bar." (AC 7.)

the court itself does not avoid the prohibition of the Act. (see *Union Central Life Ins. Co. v. McAden, et al.*, 21 F. Supp. 110 (N.D. Tex. 1937) and later authorities discussed at PB 26.)

By its express terms, the federal injunction is intended to prevent enforcement of the same provision held enforceable by the California Supreme Court. The Act is designed to prevent just such interference. The Court stated in *Hill v. Martin*, 296 U.S. 393, 403 (1935):

> "The prohibition . . . is against a stay of 'proceedings in any court of a state.' That term is comprehensive. It includes all steps taken or which may be taken in the state court . . . It applies . . . not only to an execution issued on a judgment, but to *any proceeding supplemental or ancillary taken with a view of making the suit or judgment effective.*" (emphasis added.)

Respondents and McDougal indicate the state trial court "stayed" contempt proceedings pending determination by this Court. In fact, the Superior Court, after an evidentiary hearing, pronounced McDougal *in contempt* for "knowingly selling water from the well on the . . . premises to persons and/or businesses who cause or allow the water to be transported for distribution and use outside the County of Imperial, particularly in Mexico" and McDougal was ordered to cease selling water as so described. (D 2, 3.) Only execution of the contempt judgment has been stayed pending determination by this Court. (*Id.*)

In their mischaracterization of the status of matters between courts, Respondents have carefully avoided reference to cross-contempt proceedings commenced in the district court. After instructions were requested from the Superior Court and said Court issued an order to show cause why McDougal should not be held in contempt, Respondents commenced contempt proceedings in the district court

against the undersigned for assertedly having violated the court's preliminary injunction. [Refer to docket entries on May 1, 1978 and June 7, 1978 (iia, iiia).][6]

A direct and serious conflict exists between the state and federal trial courts exemplified by the state court's contempt judgment against McDougal. The confrontation has resulted from the district court's injunction in violation of the Act.

Respondents and McDougal rely on *Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1938) for the proposition third parties are ". . . not barred by the anti-injunction act from challenging a statute on federal constitutional grounds when the statute is also under litigation on the state court." (RB 37: AC 7-8.) *Hale* is sharply distinguishable from the present case.

Despite oft repeated claims they are challenging a "home embargo" imposed by the County, Respondents in reality *do not* attack any county ordinance or general policy preventing export of ground water. As shown, it is not alleged Respondents cannot purchase land and apply for entitlement to export water; nor can it be shown they are prevented from buying water for export from owners with proper zoning entitlement. (*supra.*) Instead, they seek to enjoin enforcement of the provision in McDougal's particular use permit, which was finally adjudicated as enforceable by the State Supreme Court.

The foregoing facts, and others, make *Hale v. Bimco Trading, Inc.* inapplicable. (Please refer to further argument at PB 27-28.) The principles announced in *Vendo v. Lectro-*

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[6]The date of the first above referenced docket entry is erroneously shown as May 1, 1977 in the Appendix. Following initiation of contempt proceedings against the undersigned on May 1, 1978, a "second petition for order to show cause why disobedient parties should not be punished for civil and/or criminal contempt" was filed against the members of the County's Board of Supervisors on May 19, 1978.

Vend Corporation, 433 U.S. 623 (1977) require reversal of the district court's injunction as violative of the Anti-Injunction Act.

II.

ENFORCEMENT OF THE SUBJECT EXPORT RESTRICTION IN NO WAY AFFECTS WATER MATTERS GOVERNED BY TREATY BETWEEN THE UNITED STATES AND MEXICO.

As shown, Respondents can acquire and export ground water from the "Clifford Well", but they desire to purchase water more cheaply from McDougal, whose well is located 8 miles nearer the international border. (RB 1-2.) It should be apparent Respondents and McDougal are conducting a private venture for economic gain. However, they attempt to disguise violation of the subject export restriction as somehow being in furtherance of obligations to Mexico.

Respondents allude to an asserted shortage of "safe and sanitary water" in Mexicali and a desire to transport water to ". . . compatriots in the Republic of Mexico who continue to suffer from the increasing salinization of the Colorado River." (RB 1, 35.) McDougal refers to "strained" relations between the United States and Mexico over increased salt content of Colorado River water and says the presidents of the respective countries ". . . resolved the problem, in part . . ." by agreeing Mexico would receive specified ground water. (AC 6-7.) He claims "[t]hese dislocations led to widespread resentment of the exportation of water to Mexico . . ." and "[t]he water involved here has become an international issue of some significance

. . ." (AC 7.)[7] These efforts to infer export of water from McDougal's well is necessary and tied to official international relations are a sham.

The Treaty of February 3, 1944, guarantees annual delivery of 1.5 million acre-feet of Colorado River water to Mexico. (Treaty Series, 994.) Indeed, increasing salinity of the river was a major international issue for many years. As a result of a June 1972 visit by the President of Mexico, in which he highlighted the problem in an address to Congress, the President of the United States appointed former Attorney General Brownell to seek a permanent solution. (Refer to legislative history of the "Colorado River Basin Salinity Control Act" in 2 U.S. Code Cong. & Admin. News, 1974, pp. 3327-3378.) An agreement between the two countries was memorialized as "Minute No. 242 of the

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[7]McDougal has submitted a resolution reportedly adopted by the "Commission of the Californias, a governmental advisory group of Mexicans and Californians . . .", which he describes as "calling for the continued exportation of water from McDougal Wells." (AC 7, Exh. C.) However, the resolution actually states, in part, ". . . at the meeting in La Paz, in April 1979, a Resolution was passed indicating support for the continued distribution of potable water to the City of Mexicali from Imperial County Wells" and "there is now pending before the U.S. Supreme Court the issue as to whether this distribution may continue." It resolves "[t]his Commission recognizes the importance of the availability of potable water to the City of Mexicali. To this purpose the Committee requests, if necessary, the intervention of the office of the Secretary of State of the United States in suport of an action pending in the United States Supreme Court (Case No. 79-1003) relative to the right of the Mexican Nationals to purchase water in the United States for use in the community of Mexicali."

Said resolution is nowhere contained in the record on appeal nor was it introduced in the state court proceedings in *McDougal*. The County was not notified of the meetings of the Commission at which described "resolutions" were adopted nor is the County aware of the information submitted in support thereof. It is submitted the language quoted mischaracterizes the present action and indicates the Commission may not have been in receipt of all facts. The County is further in receipt of information, which can be produced on request, indicating McDougal's counsel may have been a member of committees or sub-committees of the Commission which influenced adoption of said resolutions.

International Boundary and Water Commission." (*Id.*, pp. 3328-3330.) The terms of the agreement were implemented by passage of the Colorado River Basin Salinity Control Act by Congress. (43 U.S.C. §§1571-1578.)[8]

Nothing in the aforesaid "Minute" or Act requires or provides for the export operation being conducted by McDougal and the Respondents. Evidence produced in the state trial court proceedings obviated claims by McDougal that water from his well was needed in Mexico and that his export business was officially sanctioned.

A communication from an official of the International Boundary and Water Commission (Mexican Section), dated November 18, 1972, addressed the matter of well water imported from Imperial County for bottling in Mexicali, Baja California, and stated, in part:

> ". . . our Central Office has reported that this matter was studied by the Ministry of Foreign Relations of the Mexican Government and the United States Embassy in Mexico, whose representatives agreed that as the importation of water from Ocotillo was not indispensible for Mexicali, it should be out of the jurisdiction of our Commission and be considered as an economic matter of exportation-importation between private parties in Mexicali, Baja California & California, U.S., as well as the authorities of Imperial County."[9]

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[8]The Act provides for construction of a major desalting complex at Yuma, Arizona to reduce salinity of water delivered to Mexico and, among other things, authorized the Secretary of the Interior to construct, operate and maintain certain well fields to supplement water delivered to Mexico. (*Id.* §§1571, 1573.)

[9]Said letter addressed to Samuel Gallagher, a resident of a parcel adjoining McDougal's, from Eng. Eduardo Arguellas C., an officer of the Mexican Section of the International Boundary & Water Commission, was officially translated and received into evidence in the *McDougal* trial. A full copy of the translation, as introduced, is attached hereto as Exhibit "A".

Said letter noted a representative of the Public Utilities Commission of Baja California indicated ". . . the imported water represents a very small percentage of the total amount of water used in Mexicali . . ." and said official further advised water is available "in sufficient quantity to serve all of the City and Mexicali Valley necessities from wells under the control of [the Public Utilities Commission] . . ." (Exh. "A" attached.)

A letter addressed to the undersigned, and dated March 19, 1980, from the Office of the United States Section of the International Boundary and Water Commission confirms there is no "minute" of the Commission "governing the sale by private interests of ground water pumped from wells in the United States and sold to private interests in Mexicali." (Exh. "B" attached.)[10]

Obligations of the United States to deliver water to Mexico are governed by treaty and acts of Congress. Said laws do not require delivery of water from McDougal's well nor is such delivery necessary to meet needs in Mexicali.

III.

THE DISTRICT COURT ERRED IN REJECTING APPLICATION OF HUDSON COUNTY WATER CO. v. McCARTER.

Respondents assert the County has improperly "interjected" California water law as a means of "explaining

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[10]Said letter further refers to a meeting of the County's Board of Supervisors held on December 14, 1972 "to discuss whether curtailment of certain commercial water well operations near Ocotillo would jeopardize the health or welfare of residents of Mexicali" and indicates representatives of the U.S. and Mexican Sections of the International Boundary Commission attended only as "observers." During said meeting, a representative of Baja California indicated curtailment of shipments of Imperial County ground water would not create a shortage of drinking water in Mexicali and he further indicated ground water was available for development in the Mexicali Valley. The transcript of the hearing was introduced in the state court proceedings. Based on the aforesaid evidence, the Superior Court found "a satisfactory showing [was] made that the issuance of [a] preliminary injunction will not deprive Baja California of needed drinking water . . ." (26a-27a.)

away'' *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828 (W.D. Tex. 1966), aff'd 385 U.S. 35 (1966). (RB 16.) However, differences in water law provide a basis for reconciling the apparent conflict between the aforesaid case and *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), wherein the Court upheld a New Jersey statute preventing water from a local stream from being diverted outside the state.

The district court purported to distinguish *Hudson County Water Co.* based on water law and concluded said case was inapplicable because ''[r]iver water was involved, and the critical factor there was the limited property right in that water possessed by the party desiring to export it. The record does not show any such limit on McDougal's property interest in the water from his well.'' (B 9.)

In *City of Altus, Oklahoma*, the Texas court likewise rejected application of *Hudson County Water Co.* by emphasizing absolute ownership rights acquired by an overlying owner under Texas' ''rule of capture.'' *City of Altus, Oklahoma v. Carr* (*supra*) at pp. 833, 840.) Said court analogized Texas ground water rights to those acquired in minerals and relied on *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911), in striking down the subject Texas statute. (*Id.*)

The ''correlative rights'' doctrine applying to percolating ground water in California replaced the absolute ownership doctrine as observed in Texas. (see *Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663 (1903) and other authorities cited in PB 34-35; also please refer to Rogers and Nichols, *Water For California* (1967) pages 354-358.) In California, each overlying owner has a common right to reasonable beneficial use of water on the overlying land, along with similar rights of all other landowners overlying the same supply and such

a "correlative right" to percolating waters is similar to the riparian right to riparian waters. (*Id.*)

It is apparent the district court erred in rejecting application of *Hudson County Water Co.* on the rationale McDougal had unlimited property rights in the ground water basin. Under California law, his rights are limited in a fashion similar to those of a riparian owner.

Respondents have likewise failed to adequately distinguish *Hudson County Water Co.* They state:

> "Once McDougal has appropriated the water and is storing it it gains the same status as captured water in *Altus, supra*. This court's decision in *Hudson County Water Co., supra,* involved riparian rights and the ability to capture the water, not what may be done with it after it has been reduced to possession. The sale of water from storage tanks does not involve the same kind of state interests considered in the physical diversion of a river's cause of flow from one state to another as was the case in *Hudson County Water Co., supra.*" (RB 18.)

Respondents thus assert use of storage tanks somehow enhances an overlying owner's rights in a ground water basin. No authority is cited for such a proposition and, it is submitted, none exists. Further, a local government's interest in preventing pumped ground water from being exported by tank trucks (albeit the water may have been filled from a storage tank at the well) appears perfectly analogous to a state's interest in preventing "physical diversion" of a non-navigable stream. Respondents have failed to "explain away" *Hudson County Water Co. v. McCarter.*

As shown, the County believes Respondents' action is clearly barred by reason of the *McDougal* decision under the doctrine of res judicata and by terms of the Anti-Injunction Act. (*supra*). Assuming *arguendo* Respondents

have standing to prosecute the present action, *Hudson County Water Co. v. McCarter* provides an independent basis for upholding the enforceability of the subject export restriction.

IV.

IMPACT OF McDOUGAL'S EXPORT OF WATER FROM THE BASIN, WHILE NOT DIRECTLY AT ISSUE, IS A MATTER OF SERIOUS DISPUTE.

McDougal has attached a copy of an asserted "recent study by the California Water Resources Control Board" which he claims "shows that there is no danger to the water basin from McDOUGAL'S pumping." (AC 6, Exh. "B".) Review indicates the study, dated June 1980, was prepared by an associate engineering geologist apparently employed by said State Board. There is no showing the study has been endorsed or acted on by the Board.

Impact of McDougal's operation on the basin is not at issue before the Court and, if it were, the aforesaid study would not appropriately be considered since it is not in the record on appeal. Further, a comprehensive study of the ground water basin, completed in November 1977 by the United States Geological Survey and entitled "Digital-Model Evaluation of the Ground Water Resources in the Ocotillo-Coyote Wells Basin" ("U.S.G.S. Study"), which *is* a part of the record, reaches conclusions contrary to those of the study referenced by McDougal.[11]

The U.S.G.S. study recognized the basin encompasses about 300 square miles in western Imperial County and ground water therefrom is the *only* source of domestic and

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[11]The U.S.G.S. Study was filed with the district court on June 28, 1978 as Exhibit "B" to points and authorities supporting the County's unsuccessful second motion for stay of the Court's preliminary injunction.

industrial in the area. (U.S.G.S. Study p. 2.) Water in the basin moves from areas of recharge at the mountain fronts in western parts of the basin to areas of discharge across the "Elsinore fault" to the east and the Mexican border to the south. (*Id.* pp. 11-12.) Natural recharge is about 2,600 acre-feet per year and the basin is estimated to contain approximately 640,000 acre-feet in storage. (*Id.* p. 20.) There has been a steady state decline in the water level which has accelerated because of increased pumpage (*Id.* 2, 20.)[12] Said Elsinore fault transects the basin in a southeastern direction and separates potable ground water in the western part of the basin from very saline water to the east. (*Id.* pp. 16-17.)

The study concludes "[p]otential problems involve both the quantity of this supply and its quality." (U.S.G.S. Study p. 20.) Specifically, as of December 1975, estimated discharge exceeded recharge by about 500 acre feet per year. (*Id.* p. 35.) The U.S.G.S. stated "[t]his constitutes mining of the ground water; unless conditions change, water levels will continue to decline." (*Id.*) Finally, the study stated "[w]ith continued lowering of water levels around Ocotillo, the possibility exists for a reversal of direction of flow. If this occurs, saline ground water could flow westward across the fault and degrade the ground water in the Ocotillo area."

Based on the record before the Court, it cannot be concluded there is "no danger" to the basin from McDougal's

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[12]In 1975, the total pumpage from the basin was estimated at 880 acres feet annually, with export of water from the "Clifford Well" constituting 120 acre-feet annually. (*Id.* p. 20.)

pumpage.[13] To the contrary, curtailment of his current export, along with other measures, may be necessary to protect the basin.

V.

McDOUGAL'S BRIEF CONTAINS SCANDALOUS MATTER WHICH SHOULD BE DISREGARDED AND STRICKEN BY THE COURT.

In purporting to argue the need for "diversity jurisdiction," McDougal states:

> "Imperial County is relatively small and extremely conservative. The County contains definite anti-Mexican elements who may express themselves in judicial elections. Witness the recent election of . . . an avowed racist and leader of the Klu Klux Klan, as the Dem-

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[13]The study attached by McDougal refers to another report prepared by Dr. David Huntley in 1979. (AC Exh. C p. 15.) Dr. Huntley's report concluded:

"1) Water level data collected by the U.S. Geological Survey from October, 1976 to September, 1979 indicate that, even in years of above-average recharge, pumpage is in excess of the safe yield of the basin. Continued extraction of ground water at the current rate will result in saline water intrusion across the Elsinore fault unless effective ground water management plans are instituted. These ground water management plans could include; a) Artificial recharge. b) Restrictions on export of ground water. c) Redistribution of pumping centers. d) Establishment of pumping or injection barriers along the Elsinore fault.

2) Contours on the water table suggest that the possibility of saline water intrusion is greater than that suggested by [the U.S.G.S. Study].

3) Water budget calculations indicate that, in years of average precipitation, ground water recharge is from 870 to 1,672 acre-ft/yr, considerably less than the 2,600 acre-ft/yr computed by [the U.S.G.S. Study].

4) In years of average recharge, basin overdraft is from 1,608 to 2,410 acre-ft/yr, considerably more than the 500 acre-ft/yr estimated by [the U.S.G.S. Study].

5) Whereas the numerical model used by the [the U.S.G.S. Study] is qualitatively correct in its projection of the effects of overdraft, it is likely that it quantitatively underestimates the seriousness of the problem. Saline water intrusion is likely to occur sooner than [the U.S.G.S. Study] indicates, possibly as soon as 6-10 years."

ocratic nominee for the U.S. Congress in the 40th District, which includes Imperial County." (AC 9.)

Said attempt to attribute racism to the County and Superior Court is irresponsible & unprofessional. McDougal cannot show he did not receive a full and fair trial in the state courts.[13] The foregoing statements fall within the prohibition of Rule 34.6 of Rules of this Court requiring "[b]riefs must be . . . free from . . . scandalous matter." Pursuant to the proscription of the rule, the brief of McDougal should be disregarded and stricken by the Court.

CONCLUSION.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

JAMES H. HARMON,
County Counsel,
Attorney for Petitioners.

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[13]Under California Code of Civil Procedure Section 394, McDougal was entitled to a change of venue or assignment of a disinterested judge from a neutral county for trial. The parties in fact stipulated to the assignment of the Hon. Andrew J. Eyman, an out-of-county Judge.

EXHIBIT A.

Comision Internacional de Limites y Aguas
Entre Mexico y Estados Unidos
Seccion Mexicana

(SEAL)

NUM. 826
EXP. X-594.1/18

ASUNTO: Importacion de agua de Ocotillo, California a Mexicali.

Mexicali, B.C., a 18 de noviembre de 1972.

SR. SAMUEL H. GALLAGHER,
P.O. Box 1393,
El Centro, California.

In regard to your communication dated November 1 of the present year, relating to well water that is being imported from the Ocotillo area in California for bottling in Mexicali, Baja, California, I wish to inform you that our Central Office has reported that this matter was studied by the Ministry of Foreign Relations of the Mexican Government and the United States Embassy in Mexico, whose representatives agreed that as the importation of water from Ocotillo was not indispensible for Mexicali, it should be out of the jurisdiction of our Commission and be considered as an economic matter of exportation-importation between private parties in Mexicali, Baja, California and California, U.S., as well as the authorities of Imperial County.

To obtain the data as to the necessity of water from Ocotillo for the residents of Mexicali, you should write (address yourself) to Engr. Leonel Vizcara Ojeda, General Manager of the State Commission of Public Utilities of Mexicali, who has informed this office that the imported water represents a very small percentage of the total amount of water used in Mexicali, the consumption for 1972 being

estimated at 99,854,800 liters (quarts + or −) per day while the importation only reaches 378,000 liters per day. Engr. V carra has offered, as published in the local press, water in sufficient quantity to serve all the City and Mexicali Valley necessities from wells under the control of said office and of a quality estimated to be superior to water from Ocotillo.

Also, you can address yourself directly to Engr. Roberto Mazon Noriega, Mayor of Mexicali, on the necessity of importing water from the United States. Verbally, this executive informed Engr. Alfonso Castro Reyes, of our office, that there are sufficient wells in the Mexicali Valley to supply the needs of bottled water for the City and Mexicali Valley, indicating that the only interest the City has was in avoiding a price raise of bottled water, which even at actual prices can not be bought by the majority of the population of Mexicali.

The total amount of water that the Health Department estimates is bottled daily in the 43 plants in Mexicali is as much as 860,000 liters per day, of which 378,000 bottles are from Ocotillo, resulting in 482,000 liters per day from the wells in the Valley (Mexicali).

Atentamente
El Jefe De La Oficina

Eng. Eduardo Arguelles C.

EXHIBIT B.

International Boundary and Water Commission
United States and Mexico
IBWC Building
4110 Rio Bravo
El Paso, Texas 79902

MAR. 19, 1980

Honorable James H. Harmon
County Counsel
County of Imperial
939 W. Main Street
El Centro, California 92243

Dear Mr. Harmon:

Per our telephone conversation, I am pleased to provide the following information:

1) A meeting of the Board of Supervisors was held on December 14, 1972 to discuss whether curtailment of certain commercial water well operations near Ocotillo would jeopardize the health or welfare of residents of Mexicali. Engineer Willard Ericson of the United States Section and Engineer Eduardo Arguelles of the Mexican Section attended, only as observers;
2) There is no Minute of the International Boundary and Water Commission governing the sale by private interests of ground water pumped from wells in the United States and sold to private interests in Mexicali;
3) The 1944 Treaty may be cited as "Treaty Between the United States of America and Mexico relating

to Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Treaty Series 994''.

If we may provide further information, please advise.

Sincerely,

Frank B. Walker
Chief, Real Estate Division